Filed 10/1/02 In re Andrew B. CA4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ANDREW B. et al., Persons Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ANDREW B. et al., Defendants and Appellants.	F035548, F035800, F035937 (Super. Ct. Nos. 89256-2, 96651-5, 96653-1) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge.

Howard J. Specter; and Mark L. Christensen, under appointments by the Court of Appeal, for Defendant and Appellant Andrew B.

Candace Hale, under appointment by the Court of Appeal, for Defendant and Appellant James R.

Elaine Forrester, under appointment by the Court of Appeal, for Defendant and Appellant Daniel W.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Brian G. Smiley, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

On January 5, 2000, separate juvenile petitions filed in the Superior Court of Fresno County alleged appellants, Andrew B. and Daniel W.,[1] both minors, came within the provisions of Welfare and Institutions Code section 602, as the result of conduct committed by them on or about December 17, 1999 and December 18, 1999.

Count I of each of the petitions alleged the minors had committed acts of vandalism in violation of Penal Code section 594, subdivision (a), a felony. Count II alleged that the minors committed grand theft in violation of Penal Code section 487, subdivision (a), a felony. Count III alleged that the minors violated Vehicle Code section 10851, subdivision (a), a felony. As to both counts II and III, it was alleged the minors intended to take, damage or destroy property exceeding $150,000 in value, within the meaning of Penal Code section 12022.6, subdivision (b). Count IV alleged the minors had attempted to burn property in violation of Penal Code section 455, a felony.

On February 7, 2000, separate first amended juvenile petitions were filed alleging that appellant Andrew B. and appellant James R.[2] came within the provisions of Welfare and Institutions Code section 602.

Count I of the first amended petition, filed against Andrew B., alleged the minor had committed acts of vandalism in violation of Penal Code section 594, subdivision (a), a felony. Count II alleged that the minor violated Vehicle Code section 10851, subdivision (a), a felony. Count III alleged that the minor attempted to burn property in

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[1] Matthew W., Daniel's younger brother was named in a separate petition. The petition against Matthew W. was dismissed after the court suppressed the confession of Matthew W.

[2] Apparently a petition similar to the ones filed against Andrew B. and Daniel W. was also filed on January 5, 2000, naming James R. However, the original petition does not appear in the clerk's transcript on appeal.

violation of Penal Code section 455, a felony. Count IV alleged the minor committed grand theft in violation of Penal Code section 487, subdivision (a), a felony. As to counts I, II and IV it was alleged the minor intended to take, damage or destroy property exceeding $150,000 in value, within the meaning of Penal Code section 12022.6, subdivision (a)(2).

Count I of the first amended petition, filed against James R., alleged the minor had committed acts of vandalism in violation of Penal Code section 594, subdivision (a), a felony. Count II alleged the minor committed grand theft in violation of Penal Code section 487, subdivision (a), a felony. Count III alleged the minor committed grand theft in violation of Vehicle Code section 10851, subdivision (a), a felony. Count IV alleged that the minor attempted to burn property in violation of Penal Code section 455, a felony. As to counts I, II and III it was alleged the minor intended to take, damage or destroy property exceeding $150,000 in value, within the meaning of Penal Code section 12022.6, subdivision (a)(2).

On March 24, 2000, prior to adjudication of the allegations of the petitions, the minors' motions to suppress their confessions and admissions made to Fresno County Sheriff's detectives were heard and denied.[3] On March 27, 2000, on motion of the district attorney, the Penal Code section 455 allegation (count III) as to the minor Andrew B. was dismissed due to insufficient evidence.[4]

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[3] With the exception of Matthew W.'s motion which was granted by the court finding the minor did not make a "free, knowing, intelligent, and voluntary waiver of his" *Miranda* rights. As indicated, Matthew W. is Daniel W.'s younger brother.

[4] Both the clerk's transcript and reporter's transcript indicate the count to be dismissed was count IV. However, the reporter's transcript clearly establishes it was the prosecutor's intent to dismiss the Penal Code section 455 allegation, which was count III of the amended petition not count IV. This is also supported by the prosecutor's statement when the court entered its true findings on April 13, 2000.

Adjudication

On April 13, 2000, after several days of testimony, which began on March 27, 2000, the juvenile court made the following findings:

As to Andrew B. the court found as true counts I (Pen. Code, § 594, subd. (a)) and IV (Pen. Code, § 487, subd. (a)). Counts II (Veh. Code, § 10851) and III (Pen. Code, § 455)[5] were found not true. The court further found the special allegations under Penal Code section 12022.6, subdivision (a)(2) true as to both counts I and IV.[6]

As to Daniel W., the court found as true counts I (Pen. Code, § 594, subd. (a)), II (Pen. Code, § 487, subd. (a)), and IV (Pen. Code, § 455). Count III (Veh. Code, § 10851) was found not true. The court further found the special allegations under Penal Code section 12022.6, subdivision (a)(2) true as to both counts I and II.

As to James R., the court found as true counts I (Pen. Code, § 594, subd. (a)), II (Pen. Code, § 487, subd. (a)), and IV (Pen. Code, § 455.). Count III (Veh. Code, § 10851) was found not true. The court further found the special allegations under Penal Code section 12022.6, subdivision (a)(2) true as to both counts I and II

Disposition

On April 27, 2000, the court pronounced the disposition as to the minors, Andrew B. and James R.

Andrew B. was declared a ward of the court and placed under the supervision of the probation department until October 27, 2001. The minor was committed to the Elkhorn Correctional Facility Boot Camp Program, not to exceed 365 days. Restitution was to be determined by the probation department after consultation with the district

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[5] During the adjudication the prosecutor dismissed count III against the minor.

[6] The minute order incorrectly indicates the court found counts I and II true and count III as not true, which is contrary to the oral pronouncement of the court.

attorney's office. Various other terms and conditions of probation were also imposed upon the minor. The maximum term of imprisonment was determined to be five years and eight months, with count I designated as the principal term.

James R. was declared a ward of the court and placed under the supervision of the probation department until October 27, 2001. The minor was committed to the Elkhorn Correctional Facility Boot Camp Program, not to exceed 365 days. Restitution was to be determined by the probation department after consultation with the district attorney's office. Various other terms and conditions of probation were also imposed upon the minor. The maximum term of imprisonment was determined to be six years and four months, with count I designated as the principal term.

On May 11, 2000, the court pronounced the disposition for the minor Daniel W. Daniel W. was declared a ward of the court and placed under the supervision of the probation department until May 11, 2001. The minor was committed to the preadolescent program for a period not to exceed 93 days. Restitution was to be determined by the probation department after consultation with the district attorney's office. Various other terms and conditions of probation were also imposed upon the minor. The maximum term of imprisonment was determined to be six years and four months, with count I designated as the principal term.

On May 11, 2000, the minors Andrew B. and James R. were returned to court so the court could advise them of their rights to appeal the findings and orders of the court.

On May 2, 2000, the minor Andrew B. timely filed his notice of appeal. On June 7, 2000, the minor James R. timely filed his notice of appeal. On June 23, 2000, the minor Daniel W. timely filed his notice of appeal.

STATEMENT OF FACTS[7]

On December 10, 1999, Mr. James Couto rented a large Komatsu tractor to rip the fields on his farm. At the end of his workday on December 17, 1999, Mr. Couto inspected the points on the ripper attachment. In order to check the points on the ripper attachment the ripper must be raised up. After checking the points, Mr. Couto lowered the ripper attachment, to preserve the seals and O rings on the hydraulics that operate the arms which raise and lower the ripper attachment. The key for the tractor was secreted underneath the dashboard. The particular tractor Mr. Couto rented could be started by "jumping" it with a piece of metal at least three inches long, which is used to make a connection between the grounding solenoid and the starter.

On December 18, 1999, at approximately 7:15 a.m., Mr. Couto arrived at the location where he had left the tractor the previous evening, but the tractor was gone. He had not given anyone permission to use the tractor either the night of the 17th, or the morning of the 18th. Similarly, Mr. Couto had not given any of the minors involved here permission to use the tractor or to be on his property. Mr. Couto followed the trail of the tractor; ultimately locating the tractor in a ditch buried up to the top of the tractor's tracks. The ditch was approximately one mile west of Yuba Avenue.

The tracks of the tractor crossed the paved roadway of American Avenue. There were, however, no marks showing the ripper attachment had been in contact with the ground, which indicated the ripper attachment had been raised prior to movement of the tractor across the paved road. After crossing American Avenue the path of the tractor entered a grape vineyard north of American Avenue, owned by Navdep Sran. The tractor

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[7] The following factual statement will include the minors' confessions and admissions, as testified to by the investigating officers both during the suppression hearings and at trial.

traveled through Mr. Sran's vineyard eventually making a left turn westward and exiting the vineyard on Yuba Avenue.

When Mr. Couto examined the tractor in the ditch, the key was still underneath the dash, hanging by its string over the brake pedal pivot arm. The tractor engine was still warm to the touch. In order to move the tractor out of the ditch, Mr. Couto had to refuel it. The tractor had "spun itself for quite a while before it ran out of fuel." This explained why the left track was buried when Mr. Couto found the tractor in the ditch the morning of December 18. The original purchase price of the tractor in 1979 was $169,413.30. The value of a used tractor, depending upon its condition, was estimated to be between $60,000 and $90,000. The distance from where the tractor was parked on the evening of December 17, 1999, to where it was found in the ditch on December 18, 1999, is approximately two and one-half miles.

In addition to the tractor being moved, Mr. Couto discovered damage to one of his deep well pump engines, which was along the path taken by the tractor on the night of December 17. From where the tractor was parked on December 17, 1999, to the pump engine is approximately one-eighth of a mile. The gauges on the pump engine had been broken, the oil dipstick had been broken off, the oil cap was missing, and the injection lines were bent. There was also a burned tire near or underneath the pump engine. The pump engine was not in that condition on the evening of December 17, nor was there a burnt tire near the pump engine. Mr. Couto had not given anyone permission to damage the pump engine or to set fire to a tire on his property.

Navdep Singh Sran, who grows raisin grapes, testified as to the damage caused to his grape vineyard on the night of December 17, 1999, or the early morning of December 18, 1999. On the night of December 17, 1999, a tractor went through his vineyard from American Avenue, south to north, turning westward at some point until it reached Yuba Avenue, a dirt road abutting his vineyard. The tractor ripped grapevines out of the ground, broke grapevines off at their roots, destroying trellises and the drip irrigation

system. Mr. Sran indicated he had already spent approximately $130,000 to $140,000 replacing the grapevines which were ripped out, and repairing the trellises. He had not yet begun replacing the drip irrigation system, which he estimated would cost him another $120,000. In addition to the monetary costs to repair or replace what had been damaged or destroyed, Mr. Sran had lost approximately 50 to 60 percent of his current crop. None of the three minors had Mr. Sran's permission to be on his property, nor did they have his permission to damage or destroy his grape vineyard.

On January 3, 2000, Sergeant Morgan and Detective Hayes of the Fresno County Sheriff's Department's Agricultural Task Force went to Kerman High School in connection with their investigation of the theft of a Komatsu 150A caterpillar tractor, vandalism committed with the use of that tractor, and an attempted arson. The deputies had received information that James R. possibly had knowledge about the crimes they were investigating. James R. was interviewed at the Kerman High School's administrative offices. Detective Hayes asked James if he knew about the theft of the tractor. James initially denied involvement. After James viewed photographs of the tractor and the damage caused, he admitted he had taken part, and implicated the other minors. James R. was advised of, and agreed to waive, his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He subsequently provided the deputies with a confession, which again implicated the other minors.

On March 28, 2000, during the course of trial, the parties entered into various stipulations, two of which are significant to this statement of facts. It was stipulated that the testimony of the following Fresno County sheriff's deputies, Sergeant Morgan, Detectives Ronald Hayes, Kirby Alstrom and Matthew McNab, which had been presented during the motions to suppress the confessions and statements of the minors, would be admitted into evidence in the prosecution's case-in-chief. This stipulation also included the deputies' testimony as to the confessions and admissions made by the minors. It was also stipulated that the amount of damage exceeded $150,000.

The various statements given by minors revealed the events of the night in question. On December 17, 1999, James R., Andrew B., Daniel W., Matthew W. and Christy B. were drinking beer at Andrew's house. Daniel W. said he snuck out of his house around 11:00 p.m. that night with his brother Matthew W. James R. thought it would be "cool" to drive a tractor through a vineyard. Andrew B. said it was his idea to steal a tractor and drive it through a field. According to James R. and Daniel W., Andrew B. said he knew where a tractor was. Andrew B. said Christy drove him to where the tractor was located. James R., Daniel W., and Matthew W. walked to the location. Andrew B. started the tractor by "arcing it." Andrew B. drove the tractor, while James R. and Daniel W. rode on the tractor. Andrew lifted up the ripper attachment, which was attached to the tractor, as they crossed a paved road. Andrew B. drove the tractor into a grape vineyard and the ripper attachment, connected to the tractor, damaged the vines and drip irrigation system of the vineyard. Andrew B. made a left hand turn onto a dirt road and both James R. and Danny W. jumped off of the tractor. Andrew B. kept driving. Andrew B. said that after Daniel W. and James R. jumped off the tractor he kept driving the tractor, eventually getting off the tractor and letting the tractor continue to run.

After getting off of the tractor Daniel W. and James R. walked back to a large fuel tank and pump, where they met up with Christy and Matthew W. James R., Danny W. and Matthew W. broke the gauges on the fuel pump and kicked and smashed the pump. Matthew W. suggested setting the pump on fire. James R. put a tire under the pump and one of the others set the tire on fire. Daniel W. said he lit the tire on fire after it was placed underneath the engine. Daniel used diesel fuel from the engine to light the tire on fire. After the tire was set on fire, Andrew B. walked up. James R. stated that when he asked Andrew B. about the tractor, Andrew replied "I just let the mother fucker keep on running."

James R. was afraid the fuel tank was going to explode, so he walked home. Andrew B. said they were all afraid the tank was going to explode so they left. Daniel

W. said the fire was quite large and they were afraid someone would see it, so they left the area. Christy took them all home, except for James. R. who walked home. Daniel W. said he and his brother walked home and snuck back into their house undetected.

Defense

At trial, the minors, while not again personally testifying, maintained that none of them were in fact involved in the incident. They continued to claim that their confessions were coerced; asserting the information they gave to the detectives during the interrogations was not based upon their own knowledge but rather was fed to them by the officers. All three minors offered alibi testimony.

Stanley W., the father of Daniel W. testified that on the evening of December 17, 1999, he was working on a car trailer until 12:30 a.m., when he went into bed. He made Daniel W. go to bed around 10:30 or 11:00 p.m. After watching Daniel go to bed, Mr. W. went back outside and put his tools away. When he finished, he went to bed, which was around 12:30 a.m. or so. On his way to bed he saw both Daniel W. and Matthew W. in their beds, one of them was snoring. Stanley W. testified that he woke both boys up at 3:30 a.m. on December 18, 1999, just before he left for work, to tell them what chores he expected them to do before he returned from work. Mr. W. remembered giving a statement to a defense investigator, but indicated he was having problems remembering the exact times he told the investigator. Mr. W. was afraid that if he testified something happened at 3:30, but it was actually 3:40, the court would find he had committed perjury. The court advised the witness that he was to answer with his best recollection of the times involved. Under cross-examination Mr. W. agreed he may have told the investigator that he was working outside on the car trailer until 2:00 a.m., rather that 12:30 a.m. as he testified to in court. Mr. W. expressed his reluctance to answer the prosecutor's questions concerning exact times, thinking the court would find him committing perjury. Similarly, Mr. W. was evasive when cross-examined by the prosecution concerning his statement to the defense investigator, believing the prosecutor

was trying to catch him in a lie. There were dogs on the property on December 17, 1999 and December 18, 1999. Mr. W. did not recall them barking before or after he went to bed.

Charles P., Andrew B.'s grandfather, testified that he never taught Andrew how to drive a tractor, but that Andrew had ridden on his tractor maybe three or four times in his life. Vickie B., Andrew's mother testified that on the night of December 17, 1999, she saw Andrew in her house from 6:00 p.m. until 1:30 a.m. on December 18, 1999, when she went into his bedroom and told him to get off of the telephone. When she went back to check on him 15 minutes later he was asleep. She saw Andrew the morning of December 18, 1999, at 9:00 a.m. in the living room of their house. Mrs. B. denied discussing aspects of the case with anyone.

Anthony M., Andrew B.'s stepfather, testified that on the morning of December 18, 1999, at approximately 5:30 a.m. he went into Andrew's room to retrieve his slippers, and Andrew was asleep. On cross-examination Mr. M. admitted he had not told this important piece of information to the attorneys for the minors until approximately two weeks prior to his testimony. He also indicated the reason he could recall the date was because of his discussions with Mrs. B. about the case.

Regina L. testified on behalf of her son, James. R. Mrs. L. testified that on December 17, 1999, her son was home with her sitting on the couch watching the news at 11:00 p.m. James R. left about 11:30 p.m. to bring his sister back from her cousin's house, which is located on the same property as their trailer. James R. returned approximately 10 minutes later with his sister. Mrs. L. said that she stayed up until approximately 11:45 p.m., when she went to bed. At 11:45 p.m. James R. was still on the couch watching television. At approximately 1:30 a.m. on December 18, 1999, Mrs. L. was awaken by the laughter of James R. and his sister. Mrs. L. got out of bed and told James and his sister to go to bed. James went to bed, but his sister stayed up a little longer.

James R. shares a bedroom with his younger brother. There is a window in their room approximately 64 inches across. The window will not open in the winter because the wood swells around it. There are other windows in the trailer, but Mrs. L. could not say whether they could be opened in the winter or not. Mrs. L. went back to bed at approximately 1:45 a.m. The next time Ms. L. saw her son was at 6:00 a.m. the morning of December 18, 1999, when she went in and woke him up. There are two doors to their trailer. The front door sticks and creaks loudly when opened. The back door also squeaks, as if it needs to be oiled, when it is opened. Mrs. L. testified she was a light sleeper and did not hear either the front door or the back being opened after 1:30 a.m. the morning of December 18, 1999.

Tina B., James R.'s aunt, testified that on the evening of December 17, 1999, James R., his sister Sharon R., her son Jamie R., Kenneth S., and herself were at her mother's house playing Play Station. They quit playing around 10:30 p.m. She last saw James R. about 11:30 p.m. when he came back over to get his sister, Sharon. They chatted for a few minutes and then she watched as James and Sharon went home to their trailer. Tina B. testified that she had spoken with Regina L. about this after James R. was arrested. Tina B. did not see James R. after 11: 30 p.m. the evening of December 17, 1999, and could not say what he did after 11:30 p.m. as she was not with him.

Sharon R., James R.'s 15-year-old sister, testified that on the evening of December 17, 1999, she was at her grandmother's house, with James R. and her other brother Shawn. Before 11:30 p.m. that evening James R., Shawn R., Kenneth S. and her aunt, Tina B., were playing Nintendo in her aunt's room. At 11:30 a.m. Sharon was talking with her cousin Casey in Casey's room, when James R. knocked on the window. She went home with James R. about 11:45 p.m. She and James R. sat on the couch watching television until about 1:30 a.m. when James R. got up and went to bed. Sharon went to bed about 1:50 a.m. She saw James R. later that morning about 8:30 a.m.

DISCUSSION

I.

DENIAL OF MOTIONS TO SUPPRESS THE CONFESSIONS OF THE MINORS ANDREW B. AND DANIEL W.

Appellants Andrew B. and Daniel W. contend the juvenile court erred by failing to exclude their confessions. They each contend that for various reasons the statements and confessions were obtained in violation of their respective *Miranda* rights.

Standard of Review

> "In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda v. Arizona* (1966) 384 U.S. 436, the scope of our review is well established. '"We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained."' (*People v. Bradford* [(1997)] 14 Cal.4th [1005,] 1033.) 'We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of *Miranda*.' (*Ibid.*)" (*People v. Box* (2000) 23 Cal.4th 1153, 1194.)

The burden is on the prosecution to establish, by a preponderance of the evidence, the validity of a defendant's waiver of his rights and the voluntariness of a defendant's subsequent confession. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168; *Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Clark* (1993) 5 Cal.4th 950, 987, fn. 12.)

> "… Among the factors to be considered are '"the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' (*People v. Williams* [(1997)] 16 Cal.4th [635,] 660.) On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. (*People v. Jones* [(1998)] 17 Cal.4th 279; *People v. Memro* [(1995)] 11 Cal.4th [786,] 826.) In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not

> "essentially free" because his will was overborne.' (*People v. Memro, supra,* 11 Cal.4th at p. 827.)" (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

Just as an adult, who is suspected of criminal conduct, is protected by the Fifth Amendment, so too is a minor. (*In re Gault* (1967) 387 U.S. 1, 55.) We review the minors' claims utilizing the federal standards to determine if their confessions were obtained in violation of *Miranda*. (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.)

The juvenile court, as to Andrew B., Daniel W. and James R., found the minors had each validly waived their rights and voluntarily confessed. James R. does not on this appeal challenge the court's ruling in this respect. However, as indicated, both Andrew B. and Daniel W. do challenge the court's ruling denying their motions to suppress their confessions and statements.

Prior to adjudication of the allegations of the petitions, the court entertained motions filed on behalf of the minors seeking suppression of their confessions and statements given to law enforcement on January 3, 2000.

On March 24, 2000, following 12 days of testimony, the juvenile court denied the motions made by Andrew B., James R. and Daniel W. The court granted the motion of Matthew W. to suppress his confession and statements finding that minor did not knowingly and intelligently waive his rights.

Andrew B.

Andrew B. contends the court erred when it denied his motion to suppress his confessions or admissions. He contends his statements were obtained in violation of his rights under *Miranda, supra,* 384 U.S. 436. Andrew specifically contends that after he invoked his right to remain silent, the officer's statement "Fine, you can go to jail" constituted an impermissible threat which resulted in his subsequent confession to the officers.

Respondent contends that Andrew B. reinitiated the interview with the officers, and the court's ruling was therefore correct.

Interrogation of Andrew B.

Andrew B. was taken into custody on January 3, 2000, during the search of his residence by deputies of the Fresno County Sheriff's Department. Andrew denied he was read or advised of his rights under *Miranda* at the time he was taken into custody. Detective Hayes remembered advising Andrew of his rights as he escorted Andrew to Detective McNab's vehicle: "I recall reading him his right[s], this is basically just read them off the top of my head. That's what I had done." Andrew was aware of *Miranda* rights from "police shows and stuff like that." Andrew admitted that about two years earlier he had been read his *Miranda* rights in connection with another incident and had refused to give a statement. Detective Hayes did not attempt to obtain a statement from Andrew while they were searching his residence. Andrew did not ask for an attorney nor did he ask for a parent, while he was at the residence. Andrew's mother was present during the search of the residence. Detective Hayes told Andrew's mother that they were taking Andrew to their office and that they would be taking his statement. Detective Hayes provided Andrew's mother with a copy of the search warrant, as well as receipts for the items seized during the search. At the time of the search of Andrew's residence, James R. was already in custody and inside Detective McNab's vehicle. Detective Hayes directed Detective McNab not to allow Andrew B. and James R. to speak to each other. After searching Andrew's residence the deputies went to Danny W.'s and Matthew W.'s residence and conducted a search, taking both Danny W. and Matthew W. into custody.

After taking all four minors into custody they were all transported to the "ag center," which is where the Rural Crime Ag Task Force has its office. Upon arrival at the ag center Andrew B. was taken inside Sergeant Morgan's office and his handcuffs were removed. Detective Hayes and Sergeant Morgan conducted the interview with Andrew B. Andrew B. asked why he was there. In response, Detective Hayes and Sergeant Morgan advised Andrew B. of his *Miranda* rights, and Andrew indicated he understood them. Detective Hayes asked Andrew B. if he would like to talk with them, and Andrew

B. indicated he was willing to talk with the deputies. According to the deputies' testimony, Andrew did not request a parent nor did he request an attorney. Andrew B. denied any involvement in the events of December 17, 1999 and December 18, 1999. According to Andrew, Sergeant Morgan raised his voice saying Andrew was "full of shit. We know you were there." Andrew stated he was intimidated by Sergeant Morgan. Later, Andrew testified he was not in any danger and was not scared. Eventually Andrew B. stated he no longer wanted to speak with the deputies and, according to the minor's testimony, he also requested a lawyer. Andrew stated he told the deputies: "Fine. You know what, I'm not going to say nothing. … I want a lawyer." Then, according to Andrew, Sergeant Morgan said "Okay then, we're going to have to do this the hard way," asked Andrew to stand up and then handcuffed him. Andrew said he was scared after being handcuffed again. Andrew testified that Detective Hayes left the room, and then Sergeant Morgan said "Man, come on. Let's just get this over with. Tell me what you did and how you did it." Andrew testified that the only question he answered was how he started the tractor and, there were no additional questions asked of him by the officers after he agreed to talk. Andrew did not believe he would be getting anything in return for his confession, but "would just get it over with." Andrew believed that after this he would be taken to juvenile hall, and he would be released after booking. Under cross-examination Andrew testified that he was told they would be taken to juvenile hall for booking and would be released, and that the deputies told him this after the joint confessions had been tape-recorded.

According to the testimony of the officers, Sergeant Morgan ordered Detective Hayes to handcuff Andrew B., telling Andrew B. "Fine, you can go to jail," and ordered Andrew B. to stand up. Both Detective Hayes and Sergeant Morgan ceased their attempts to question Andrew once he indicated he was no longer willing to speak with them. Both Detective Hayes and Sergeant Morgan considered their interview at an end. After Andrew B. stood up, Detective Hayes, per Sergeant Morgan's order, handcuffed

Andrew B. "The interview had concluded, [Andrew B.] was under arrest, and at that point in time we were going to complete the rest of our paperwork, make the phone calls to the parents, and transport him to juvenile hall." Sergeant Morgan then told Andrew B. to sit back down. Andrew B. refused and Sergeant Morgan had to tell him several times to sit down. Eventually, Sergeant Morgan stood very close to Andrew B. and said "You need to sit down. You need to sit down now." After this, Andrew sat down, and asked "What, what do you want to hear?" In reply, Sergeant Morgan said "the truth." Andrew again asked "What do you want to hear?" In response Sergeant Morgan asked Andrew who started the tractor? Thereafter, Andrew B. provided a statement implicating himself in the taking of the tractor and driving it through the grape vineyard. Detective Hayes did not take any notes during Andrew B.'s statement, nor was Andrew B.'s statement tape-recorded.

A subsequent tape-recorded interview (apparently referred to as the joint confessions) was made involving all four of the minors who were present together in the lobby of the ag office. The deputies restated each of the minors' statement to the entire group and the minors were then individually asked if the statement attributed to them was correct as to their respective statements. Each minor was asked if they disagreed with the statements of the other minors. None of the minors indicated they did not agree with the statements. Just prior to the conclusion of the taped interview Andrew B. recanted his confession, indicating he was just telling the deputies what they wanted to hear.

Court's Ruling

The court, after assessing the evidence and testimony presented, concluded Andrew B.'s statement was admissible.

> "… Andrew was 17 years at the time. I have to again say, as to him, I -- him, I was impressed with his intelligence. He's close to being 18 years of age. [¶]…[¶] He answered questions very appropriately and didn't hesitate, didn't seem to have to think about answers. I don't know anything about his grades, but based on his testimony here in court, I have to assume

that he -- it's at least average grades, and he certainly is at least of average intelligence. [¶] When the officers arrived at his home, it was already nighttime. The testimony was that the officers arrived there probably 8:00, 8:15, or so. He was in bed when they got there and asked him -- he asked if he could get dressed, and he was allowed to put on his clothes. He was handcuffed in the living room, and ultimately placed in a Ford Expedition with the -- James was already in the vehicle. I know they -- and then they were taken to [Daniel W.'s and Matthew W.'s] home. [¶] When Andy was first arrested, he was not questioned. Officer Hayes stated he read him his rights from the top of his head. I believe this took place when Andy was still in bed. There was no request for an attorney or parent. Andy's mom was home at the time this occurred.…

"As to -- as to Andy, when they interviewed him separately, at the ag station, he was placed in a room that was approximately eight feet by ten feet. He was obviously in custody. He was handcuffed, so this is a custodial interrogation. As I recall the testimony, Sgt. Hayes -- Officer Hayes was going to start questioning, and Sgt. Morgan stated that, let's do this right, so he was re-Mirandized from the card. He answered all the questions appropriately, stated he understood, he wanted to talk. He started cussing and was told by Officer Hayes that that was inappropriate, they weren't cussing at him, finally got him to settle down a bit. They -- they had taken his cuffs off before they were going to question him, but he started acting up. They cuffed him again. He was hostile, he was angry, and he stated, at one point, I don't want to talk to you, or words to that effect, which implicate the right to remain silent. Sgt. Morgan responded that that's fine, you can go to jail, instructed Officer Hayes to rehandcuff him, and so, he was, in fact, rehandcuffed. The interview was apparently terminated. That was Officer Morgan -- Sgt. Morgan's testimony, that the interview was over at that point. He was told to sit down. He wouldn't do it. He ordered him to sit down, at least on three occasions, and on the last occasion, Sgt. Morgan apparently got in his face, basically told him to sit down. I guess they got into a staring contest. Ultimately he sits down. He was told, you need to sit down now. And then Andy asked the question, what do you want me to tell you. So, I find that he reinitiated communication with the officers. It's not the officers failing to abide by his Miranda right to remain silent, he reinitiated contact with the officers, and he was told they wanted the truth. He did not ask for a lawyer, at any point, or even a parent. Even if he asked for a parent, however, the law is clear today that that's not a per se rule, that that's a request for an attorney, so that does not work today.

> "I'm satisfied that the conversation was -- or the -- the interrogation was in a conversational tone. There was no yelling, no threats or promises, other than, apparently, Sgt. Morgan was pretty firm when he told him to sit down, please sit down. That's the only time I find that there was some very loud voice used, and, obviously, he had to be in command. The interview took place over a period of 40, 45 minutes. Again, there was nothing by the officers telling him what had happened at the vineyards or was -- were statements made by the officers clarifying things that the minor had said, perhaps letting him know that that's not accurate, that's not the information they have, some other sources, and, ultimately, they had a full confession from Andy. [¶] As to Andy, the Court also finds that the confession here was knowing, intelligent, and voluntarily given, under the totality of the circumstances, the Court -- as the Court finds them."

It is this ruling to which Andrew B. takes exception.

The Fifth Amendment of the United States Constitution, as applicable to the states under the Fourteenth Amendment of the United States Constitution, requires that a person subjected to custodial interrogation be "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." (*Miranda, supra,* 384 U.S. at p. 444.)

Here, as found by the court, Andrew B. invoked his right to remain silent when he indicated to Detective Hayes and Sergeant Morgan he no longer wished to speak to them. The court concluded that Andrew B., contrary to his testimony, did not request an attorney at the same time.

Once a defendant invokes his right to remain silent, or his right to counsel, all questioning must cease. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485; *People v. Sims* (1993) 5 Cal.4th 405, 440.) The right to remain silent and the right to counsel are, however, two distinct and separate rights; one is not invoked by reference to the other. (*Miranda, supra,* 384 U.S. at p. 474; *Michigan v. Mosley* (1975) 423 U.S. 96, 104, fn. 10.) "*Miranda* delineates two separate rights — the right to remain silent, and the right to

have counsel present during interrogation." (*People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1269.) In the context of the right to remain silent, a defendant's statements obtained subsequent to invocation of that right can be inadmissible if their right to stop further questioning was not scrupulously honored. (*Michigan v. Mosley, supra,* at p. 104.)

Here, it is clear that Andrew B. invoked his right to remain silent when he indicated he no longer wished to speak with Detective Hayes or Sergeant Morgan. At this point the interview was over. Both Detective Hayes and Sergeant Morgan scrupulously honored Andrew's invocation of his right to remain silent. As the interview was over, Sergeant Morgan ordered Detective Hayes to cuff Andrew B., as he would be transported, along with the other minors, to juvenile hall. Appellant contends however, that the statement by Sergeant Morgan "Fine, you can go to jail," constituted "the functional equivalent of a threat." Respondent contends this was not a threat inducing Andrew to relinquish his just invoked right to remain silent, but was instead acceptance that the interview was at an end. Additionally, respondent argues that this argument, while appropriate at the juvenile court level is not appropriately raised on appeal, considering the court "heard the inflections in Morgan's voice, observed Morgan's demeanor, and thus … was best situated to interpret whether Morgan's statement was the functional equivalent of a threat or promise." Respondent's contention is well taken, in light of the court's ruling that neither Detective Hayes or Sergeant Morgan threatened the minor.

We accept the court's resolution of the disputed facts and the inferences drawn therefrom, as well as its evaluations of credibility, provided they are substantially supported by the evidence. However, we do not abdicate all responsibility to the juvenile court, as we must still independently evaluate the undisputed facts, and those facts found by the court, to determine whether the court's ruling was in fact correct. (*People v. Box, supra,* 23 Cal.4th at p. 1194.)

It is undisputed that Andrew B. stated he no longer wished to speak with deputies. The court concluded that neither Detective Hayes or Sergeant Morgan asked any further questions of Andrew B., and had accepted that their interview with the minor was concluded. The court, however, further found that it was Andrew B. who reinitiated the interview by asking them what they wanted to hear. Under these facts we cannot say the court's ruling finding that Andrew B. had in effect withdrawn his invocation of his right to silence was palpably erroneous. (*In re Eric J.* (1979) 25 Cal.3d 522, 527 [ruling on *Miranda* issue will be upheld if supported by substantial evidence]; accord *People v. Siripongs* (1988) 45 Cal.3d 548, 575.)

In *Oregon v. Bradshaw* (1983) 462 U.S. 1039, the Supreme Court held that where a defendant has invoked his or her Fifth Amendment rights, but later initiates conversation with law enforcement, there are two inquiries that must be made. Both of these inquiries were suggested in the court's earlier opinion of *Edwards v. Arizona, supra,* 451 U.S. 477. First, did the defendant intend to reinitiate discussion concerning the investigation being conducted? If the answer is yes, the second inquiry asks did the defendant subsequently knowingly, intelligently and voluntarily waive their Fifth Amendment rights? "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." (*Edwards v. Arizona, supra,* at p. 486, fn. 9.)

Here the court found Andrew reinitiated the discussion with the deputies. The court further found "[t]here was no yelling, no threats or promises, other than, apparently, Sgt. Morgan was pretty firm when he told him to sit down, please sit down. That's the

only time I find that there was some very loud voice used, and, obviously, he had to be in command." The court found under the proper standard that Andrew's subsequent confession was knowingly, intelligently and voluntarily given.

We conclude the court's ruling finding Andrew B.'s confession admissible was correct.

Daniel W.

Daniel W. contends that his request for his father was the equivalent of the invocation of his rights under *Miranda, supra,* 384 U.S. 436 and the Fifth Amendment to the United States Constitution. He asserts his subsequent statement admitting his complicity in the alleged criminal acts should have been suppressed and the court erred in denying his motion to suppress his statements. Daniel further contends, regardless of the resolution of the foregoing claim, that the juvenile court's determination that his waiver of his Fifth Amendment rights was knowing, intelligent and voluntary, was erroneous, thus compelling reversal of the court's decision to deny his motion to suppress his confessions.

Respondent disagrees, contending that there is no longer a per se rule that a minor's request for a parent is an invocation of the minor's rights under the Fifth Amendment. Respondent asserts that the minor really only raises one issue with respect to the court's ruling and that is whether, under the totality of the circumstances, the minor's waiver of his rights was knowing, intelligent and voluntary. Respondent contends the ruling made by the juvenile court was correct. Respondent, for the sake of argument, maintains that even if the court's ruling was erroneous, any error was harmless beyond a reasonable doubt.

Interrogation of Daniel W.

Daniel W. testified in support of his motion to suppress his statements. Daniel "kind of figured" why the deputies contacted him on January 3, 2000. Earlier in the day, at approximately 4:00 p.m., he had been over at James R.'s house and James's mother

told Daniel that James had been arrested and the police may want to question Daniel. James's younger brother Sean,[8] told Daniel that there had been damage to a tractor and "stuff." Daniel said Sean told him the tractor was damaged and had gone through some grapevines. Daniel went home and told Matthew what he had learned from James's mother, then he went over to another friend's house and played video games until 6:00 p.m. when he returned home.

When the officers arrived at his trailer, they asked for Daniel by name. Daniel came out from his bedroom. He was handcuffed with his hands behind his back. Daniel stated he believed he was read his *Miranda* rights, and "knew what they were and everything." Daniel indicated he "kind of teared up and I asked for my father," although he did not believe the officers heard him because "there was real loud talking in the house." Daniel's father was not at home, but Sabrina T., the father's girlfriend was. Sabrina T. testified that she heard Daniel tell her "he wanted his dad." Sabrina T. was standing right next to one of the officers and two to five feet from where Daniel and Matthew were seated on the couch. Sabrina stated that when Daniel made that request the two officers looked back and forth at each other. Both Sabrina T. and Matthew testified that Matthew also asked Sabrina T. to call his father. When Sabrina attempted to leave the trailer to go next door to the grandmother's trailer to use the telephone to contact the father, an officer standing at the door would not let her leave.

Daniel was not questioned by the officers while he was at the residence. Daniel stated the officers did say to him "You know what's happened. You know what's going on," and advised him they were taking him in for questioning. On the ride to the ag center the two sheriff's deputies that accompanied him engaged him in conversation about a wild boar's head they had observed at his trailer and about hunting.

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[8] The record contains two different spellings: "Shawn" and "Sean."

Detective Hayes told Sabrina to contact Daniel's father so Detective Hayes could advise him what was going on with his sons, and left her his business card. Sabrina T. testified that Detective Hayes told her she could call the number on the card in the morning to find out "what was going on with the boys."

Upon arrival at the ag center Daniel was taken into a room with three sheriffs' deputies, where he was questioned. It was about 8:30 or 9:00 p.m. and Daniel said he "was pretty tired." Daniel indicated he denied any involvement for 15 to 20 minutes. The entire interview took "an hour or two." Daniel testified he was only read his *Miranda* rights while he was at home, and he was not advised of his rights again after that. After first denying his involvement Daniel eventually admitted he was involved. Daniel said he believed he asked for his father again after they arrived at the ag center, but the officers "kind of ignored" him.

Both Detective McNab and Deputy Alstrom testified concerning their interview with Daniel conducted at the ag center on January 3, 2000. Daniel was advised of his rights by Deputy Alstrom. Detective McNab heard the beginning of the *Miranda* advisement, but left the room to speak with other deputies to get more information on the case. Daniel said he understood his rights and did not have any questions. Deputy Alstrom then asked some questions about the incident. Deputy Alstrom, while not present during the entire interview, never heard Daniel request a parent or an attorney. Detective McNab conducted the bulk of the interview with Daniel. Detective McNab asked Daniel if he had been *Mirandized*, and whether Daniel wanted to speak with him. Daniel answered yes to both questions. During the interview Daniel never requested a parent or an attorney. Similarly Daniel never indicated to Detective McNab that he was

unwilling to speak with him. Portions of the interview with Daniel were taped.[9] Detective McNab placed a tape recorder on his desk, which was approximately 14 feet away from where Daniel was sitting during the interview. Detective McNab testified that his purpose in recording the interview was not to memorialize the actual interview, but was as a training aid for himself to develop better interviewing skills.

Court's Ruling:

> "As to Daniel and Matthew [W.], the first contact with the officers was, as I recall it, approximately 8:30, 8:45, on January 3rd; that's at night. It's probable that both minors were expecting the police to show, because the earlier information that Daniel had received from -- I believe it was James's brother, little brother, and also from James's mom, that he'd been arrested, and that something to do with a tractor. I'm also satisfied that this was the testimony of the kids, even, at least Matthew, that his brother told him as to deny any involvement, that he was not involved in anything. When the officers arrived with a search warrant, as soon as they determined these were the boys, they handcuffed them both. They were cuffed in the back, they were obviously under arrest. There is some question whether or not they were read their Miranda rights, but Officer Morgan -- Sgt. Morgan testified that he read them from the card, asked them if they understood, but they were not questioned at the home.
>
> "The testimony as to Sabrina [T.] regarding whether or not she was not allowed to leave the residence, I think that is absolutely clear that the officers, for security purposes, did not allow her to leave the home to call the boys's father. Based on the evidence I've heard in this case, I do find that both boys asked for their father. I do find that to be true. The officers were busy doing other things, and one of the officers stated he wasn't sure when they asked for the father. Others are saying that he never heard that. But, in any case, I find that that request was made. Mr. -- Ms. [T.] was not allowed to go call the father. And that's not a per se invocation of a right to an attorney, but that's some indication, at least, that they wanted their father present, and had he been called and been able to get to them, perhaps been

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9 The tape was admitted into evidence. The court listened to the tape prior to ruling on the minors' suppression motion. The audio quality of this tape recording is quite poor, and it is difficult to hear the participants' voices.

-- offered them some comfort, some advice, perhaps obtained an attorney for them. Who knows. It's speculation. [¶].…[¶][10]

"As to Daniel, Daniel is 13 years of age. A lot of the things that I talked about his brother [Matthew] applies to him, as well. Obviously, the entry of the officers to the home, the arresting of the two minors, their being handcuffed, Deputy Kirby Alstrom and Manny Duenas were the transporting officers. [¶] Again, as to him, it appears there were Miranda warnings given at the home. I looked through my notes, and I -- at this point, I don't mind if counsel want to remind me of something I may have missed. Warnings were given. I don't remember any officer saying they actually waived their rights, but I recall -- was there a waiver?[11] [¶] … [¶] As to Daniel, obviously, he was not questioned at home, and he was not questioned on the way to the ag center. At the ag center, he was asked, by Officer Alstrom, if he watched cop shows on TV, and answer was yes, and asked him if he knew anything about his Miranda right, and he did know about the right to remain silent, and, apparently, that was all he knew. So, at that point, his rights were read, but not from the card. And that presents a problem, because then we have to make a finding that the officers actually properly recited the right and didn't miss anything, so if he used a card, obviously, we don't have that problem and it's clear-cut. The answer here was, yes, he understood his rights, as read. He did not make a request for a parent or a lawyer. Again, no threats, no promises, none of that stuff, the usual questioning and, you know, usual manner of getting to it, you know. I didn't find anything in Deputy Alstrom's questioning that would be improper -- wasn't getting in his face, no threatening, no promising, nothing physically intimidating. The only thing even approaching anything that might be suspicious was when Det. McNab, at some point, became involved in the questioning, and he may have said, lying to us, but I don't think that is so suspicious that it could result in the Court saying that there are problems with this particular confession.

"I'm satisfied that when the police arrived at Daniel's home and he was advised of his rights, that he kind of teared up, and this was supported by

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10 The omitted portion of the ruling pertained exclusively to Matthew W. and the court's decision to suppress his statements.

11 At this point the prosecutor interjected his statement that the father's girlfriend Sabrina T.'s testimony indicated that Daniel had said yes. Daniel's defense counsel contended there was no articulated waiver.

the testimony of his brother and, I believe, Sabrina [T.]. I suppose the impact of a thing that he'd been fearing had just occurred, and he was really feeling, emotionally, the impact of being arrested. When he was questioned, after arriving at the ag center, by his estimate, they arrived at about, he said 8:30 or 9:00. It was a little bit later, I believe, through the testimony of the other witnesses, he was feeling kind of tired. His normal bed time is at 9:00. He denied knowing what happened for about 15 minutes, or so. That was his estimate. His own testimony was that he asked for his father again at the ag station. He believes that occurred when he was being questioned. The officers testified to the contrary. He believes he was Mirandized at the ag station by the Hispanic officer. That would have been Officer Duenas. [¶] Again, it appears that the interview was conducted in a calm, professional manner. There was nothing hostile about the interview itself, nothing threatening. The -- the hardest question for the Court is to the understanding of a 13 year old, as regards to his Miranda rights. He would have been Mirandized on at least two occasions. The Miranda warnings are really pretty straight forward, if you listen to them. It's the consequences of giving them up that is probably the hardest thing for the Court to resolve. It's clear you have a right to remain silent, you have a right to an attorney. If you cannot afford one, one will be appointed to represent you, all those things, but what does that really mean to a 13 year old, when being asked if you understand that you have these rights and do you want to talk, doesn't really know the sort of trouble he's in, what can happen to him. This is not an easy issue to resolve.

"I do find that Daniel had been concerned about this, because he probably, since the time that -- at least that was at James's home and learned that James had been arrested, obviously told by the mom that they might be coming to talk to him, knowing that James had been arrested, he warned his brother about -- to deny any involvement, what that does to the Miranda rights, 'cause I think he's certainly thinking about what's going to happen to him if the police do come. Are they going to arrest him? Are they going to talk to him? What's going to happen? I don't think it's any mystery to anyone, not to a 13 year old, that kids are regularly taken to juvenile hall for a variety of reasons and kept there for a long time. I don't know the consequences are that kids spend a lot of time locked up, but the -- for commissions of offenses, violations of the law. [¶] Taking everything into consideration, his age, the manner of the arrest, the knowledge that he had that he was probably going to be talked to, if not arrested, the advisement of rights on two separate occasions, I have to find that they were properly given, even though one was given at the top of the officer's head. When he recited the rights here, he did it properly. The manner of questioning, the place where it occurred, even though he was a little tired. There's no

> suggestion that he was completely worn out or was worn out by the officer's questioning.
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> "I'd have to find that, in Daniel's case, that he did understand his rights and made a proper waiver of those rights, so I find he made a free, knowing, intelligent, voluntary waiver of his rights, so his confession is not suppressed, as to the joint confession."[12]

Daniel W. places great reliance upon the case of *People v. Burton* (1971) 6 Cal.3d 375 (*Burton*), which held that a minor's request for a parent was a per se invocation of the minor's rights under the Fifth Amendment.

> "Accordingly we hold that when, as in the instant case, a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege. The police must cease custodial interrogation immediately upon exercise of the privilege." (*Burton, supra,* 6 Cal.3d at pp. 383-384.)

The question becomes whether subsequent decisions have eroded *Burton's* per se holding.

In *In re Michael C.* (1978) 21 Cal.3d 471, 474, the California Supreme Court extended the application of *Burton* to include a minor's request for his probation officer, prior to custodial interrogation, as a per se invocation of the minor's Fifth Amendment rights. "Defendant's request to see his probation officer at the commencement of interrogation negated any possible willingness on his part to discuss his case with the police; it thereby invoked his Fifth Amendment privilege." (*Ibid*.) The Supreme Court's decision reversed the trial court's ruling holding the defendant's confession admissible. (*Id.* at p. 478.)

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12 It would appear that the last phrase "as to the joint confession" is really the commencement and part of the next following paragraph where the court discusses the joint confession and how novel it was.

This precise holding was subsequently reversed by the United States Supreme Court in *Fare v. Michael C.* (1979) 442 U.S. 707 (*Fare*). The Supreme Court indicated that the California Supreme Court's decision impermissibly imposed greater restrictions on an issue of federal constitutional law, by equating a minor's request for a probation officer with a request for an attorney. (*Id.* at p. 718.) The court examined the rule it had announced in *Miranda*, noting, without deciding, that it had not yet held "*Miranda* applies with full force to exclude evidence obtained in violation of its proscriptions from consideration in juvenile proceedings." (*Id.* at p. 717, fn. 4.) The *Miranda* per se rule, as interpreted by the United States Supreme Court, only applied to the specific request for an attorney.

" … [T]he unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (*Fare, supra,* 442 U.S. at p. 719.)

The court concluded:

> "We hold, in short, that the California Supreme Court erred in finding that a juvenile's request for his probation officer was a *per se* invocation of that juvenile's Fifth Amendment rights under *Miranda*. *We conclude, rather, that whether the statements obtained during subsequent interrogation of a juvenile who has asked to see his probation officer, but who has not asked to consult an attorney or expressly asserted his right to remain silent, are admissible on the basis of waiver remains a question to be resolved on the totality of the circumstances surrounding the interrogation.* On the basis of the record in this case, we hold that the Juvenile Court's findings that respondent voluntarily and knowingly waived his rights and consented to continued interrogation, and that the statements obtained from him were voluntary, were proper, and that the admission of those statements in the

proceeding against respondent in Juvenile Court was correct." (*Fare, supra*, 442 U.S. at pp. 727-728, italics added.)[13]

The court in *People v. Soto* (1984) 157 Cal.App.3d 694, accepted a 19-year-old defendant's claim that his request to speak with his mother was an invocation of his right to remain silent. In doing so, the court acknowledged the per se rule of *Burton*, but found it was inapplicable as the defendant was not a juvenile. (*Id.* at pp. 705, 710.) The court then applied the totality of the circumstances rule announced in *Fare*, finding the defendant had invoked his right to remain silent under the Fifth Amendment. (*Id.* at p. 705.) The court unequivocally stated their decision rested solely upon the defendant's claim that his request to speak with his mother was the invocation of his right to remain silent and was not a request for an attorney. (*Ibid*.) In a particular discussion of *Fare* the court construed that decision as a discussion of the right to remain silent, without discussing whether or not the decision had in effect overruled the per se *Burton* rule that a minor's request for a parent was the equivalent of a request for an attorney. (*Id.* at 706.)

In *People v. Rivera* (1985) 41 Cal.3d 388 (*Rivera*), the Court, in dicta, indicated that the per se rule announced in *Burton* may have been called into question, as a matter of federal law, by the United States Supreme Court's decision in *Fare*. The court went on to state that the *Burton* rule still had vitality on independent state constitutional grounds, and under Evidence Code section 940 as well. (*Id.* at p. 395.) However, subsequent interpretations of the application of article I, section 28, subdivision (d) of the California Constitution, have concluded that exclusion of statements, such as Daniel's, will only be required if based upon federal grounds, and not upon independent state grounds. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1188; *People v. Sims, supra,* 5

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13 "On remand [of this case] the California Supreme Court entered a minute order affirming the trial court's judgment. (Minutes of the Supreme Court, Apr. 17, 1980.)" (*People v. Prysock* (1982) 127 Cal.App.3d 972, 988.)

Cal.4th at p. 440; *People v. Markham* (1989) 49 Cal.3d 63, 71; *People v. May* (1988) 44 Cal.3d 309, 315.)

In *People v. Maestas* (1987) 194 Cal.App.3d 1499 (*Maestas*), the Court of Appeal discussed the *Burton* rule, without specific discussion of the per se rule. There a minor, who was convicted in a court trial of murder, contended his requests to speak with his mother, and her requests to speak with him, violated his privilege against self-incrimination. The minor relied upon the *Burton* decision to support his contention. Specifically, the minor's appeal contended that the law required law enforcement advise a minor of his right to speak with a parent when either the minor or the parent request they be allowed to communicate with the other. The court concluded the minor misapprehended not only the law, but the facts of his particular case as well. (*Id.* at p. 1508.)

The court's discussion of the *Burton* case was brief, and there was no specific reference to the per se rule. Instead the court focused on the totality of the circumstances to conclude the minor had not requested to speak with his mother prior to waiving his rights and agreeing to speak with the officers, nor were there any facts to indicate his subsequent request to speak with his mother should "'"be construed to indicate that the minor suspect desire[d] to invoke his Fifth Amendment privilege."'" (*Maestas, supra,* 194 Cal.App.3d at p. 1509, quoting *Burton.*) In explicating their reasoning for reaching this conclusion the court also referred to the case of *Rivera, supra*, 41 Cal.3d 388, and its discussion of the "'evidence demanding a contrary conclusion'" language of *Burton,* finding there was contrary evidence to show the minor was not invoking his rights under *Miranda*. (*Maestas, supra,* 194 Cal.App.3d at p. 1509.)

In *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528 (*Ahmad A.*), the court acknowledged the per se rule of *Burton*, and the unique attempt by the minor to invoke its protection. The minor, having been taken into custody in connection with an ongoing homicide investigation, was advised of his *Miranda* rights and requested he be allowed to

speak with his mother. The minor's request was granted and the minor and his mother were left alone in a police interrogation room, where, unbeknownst to either of them, the police surreptitiously recorded their conversation. The recorded conversation implicated the minor in the homicide being investigated. The minor objected to the court's consideration of the recorded conversation and his admission of complicity in the homicide from the court's determination of his fitness for treatment as a juvenile (Welf. & Inst. Code, § 707, subd. (b)), asserting it was a violation of his rights under both *Miranda, supra,* 384 U.S. 436 and the rule announced in *Burton*. The trial court overruled his objection, and found him unfit. The minor sought writ relief. In affirming the trial court's decision and denying the minor the relief he sought, i.e., exclusion of his admission, the court discussed both *Burton* and *Fare*.

The minor's exact contention, both in the court and in his petition, was that having invoked his right to counsel (by requesting he be allowed to speak with his mother) his conversation with his mother became the equivalent of a sacrosanct conversation with an attorney, and the surreptitious recording of their conversation violated not only his Fifth Amendment privileges, but also his Sixth Amendment right to counsel.[14] The court rejected this novel attack, finding there were no federal constitutional grounds to exclude the tape-recorded admission, in doing so the court addressed both *Burton* and *Fare*. It acknowledged the per se rule of *Burton*, and the *Fare's* decision which rejected "any per se extension of *Miranda's* prophylaxis." (*Ahmad A., supra,* 215 Cal.App.3d at p. 537.)

In re Aven S. (1991) 1 Cal.App.4th 69, a 15-year-old minor challenged the trial court's denial of his motion to suppress his confession, claiming his statements were

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14 The minor also raised challenges under the Fourth Amendment and his right to privacy under Penal Code section 2600. We need not discuss these aspects, as they are not pertinent to our discussion in the instant appeal.

obtained in violation of his *Miranda* rights. The minor's particular challenge was that in evaluating whether a minor, as opposed to an adult, has waived their *Miranda* rights the prosecution must establish the voluntariness of the waiver beyond a reasonable doubt. (*Id.* at p. 75.) The court rightfully rejected the minor's claim, concluding the proper standard was the same as that applied to an adult, proof by a preponderance of the evidence. In reaching this conclusion, the court cited the *Fare* decision and accepted its totality of the circumstances test as the proper method to evaluate the minor's challenge. (*Id.* at pp. 75-76.) Later in their discussion, the court acknowledged the *Burton* per se rule: "Although a juvenile's request to speak with his parent will normally be construed as an invocation of his Fifth Amendment rights [citing *Burton*], police interviewers are not obliged to advise a juvenile suspect of a right to speak with parents or have them present during questioning [citations]." (*Id.* at p. 76.) This acknowledgement of *Burton* came without any discussion of the continuing vitality of this rule in light of the *Fare* decision's totality of the circumstances test, and the court's own acknowledgement of that decision within their own opinion.

We must decide whether "a minor [who] is taken into custody and is subjected to interrogation, without the presence of an attorney, [and who] request[s] to see one of his parents, made at any time prior to or during questioning, must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege," the precise rule announced in *Burton, supra,* 6 Cal.3d at pages 383-384, is based upon federal grounds.

In *People v. Lewis* (2001) 26 Cal.4th 334, the minor claimed his confession should have been suppressed because he had requested his mother during his custodial interrogation. In rejecting the defendant's claim, because it was raised for the first time on appeal, the court noted the differing subsequent interpretations of the *Burton* rule as stated in *Rivera, supra,* 41 Cal.3d at page 394 and *People v. Hector* (2000) 83

Cal.App.4th 228 (*Hector*). (*People v. Lewis, supra,* at p. 385.) The court did not indicate one way or another whether the per se rule of *Burton* was still viable in light of *Fare*.

In *In re Bonnie H.* (1997) 56 Cal.App.4th 563, the Court of Appeal was confronted with an issue of a minor's subsequent confession being obtained after the minor had invoked her right to counsel in a prior custodial interrogation regarding a homicide investigation. The subsequent confession was obtained after a break in the custody of the minor of approximately a month's time. In the prior interrogation the minor (who had falsely claimed to be 19 years of age) invoked her right to counsel and the officers ceased their questioning. The minor was ultimately released from custody. (*Id.* p. 566.) The minor challenged the trial court's ruling denying her motion to suppress her subsequent confession. The minor contended that having once invoked her right to counsel, in connection with her initial interrogation, the officers could not subsequently interrogate her about the same homicide investigation. However, the court found the break in custody did not bar a subsequent valid and effective waiver of her *Miranda* rights or an interrogation after waiving those rights.

In connection with her challenge as to the voluntariness of her waiver of her rights under *Miranda*, the court discussed the totality of the circumstances approach, which was applied by the trial court, as articulated by the *Fare* decision.

> "… We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits–indeed, it mandates–inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. [Citation.]" (*Fare, supra,* 442 U.S. at p. 725.)

The Court of Appeal concluded the trial court's application of *Fare*'s totality of the circumstances was appropriate, based upon the facts of the minor's case. However,

since the minor had not requested to speak with her mother, the court was not called upon to decide whether the *Burton* per se rule was still applicable.

In *Hector, supra,* 83 Cal.App.4th 228, the court was confronted with a situation similar to the one raised here by Daniel W.'s appeal. In *Hector* the Court of Appeal rejected the strict application of the *Burton* per se rule, and instead applied the totality of the circumstances test of *Fare* to determine whether a minor's request to telephone his mother, made during the course of his interrogation, was the invocation of the minor's right to counsel under the Fifth Amendment. The court first recognized that article I, section 28, subdivision (d) of the California Constitution precludes exclusion of evidence except when required under the federal Constitution. (*Id.* at p. 230.) Second the court stated:

> "… The California Supreme Court's decision in *People v. Burton* (1971) 6 Cal.3d 375, 383-384, is not irreconcilable with *Fare v. Michael C.* Both cases demand consideration of the circumstances surrounding a minor's request to speak to a parent to determine whether that request constitutes an invocation of the right to remain silent or a request for an attorney." (*Hector, supra,* 83 Cal.App.4th at p. 230.)

In reconciling the two decisions, the Court of Appeal focused upon the language of the *Burton* decision, which indicated that "'in the absence of evidence demanding a contrary conclusion'" (*Hector, supra,* 83 Cal.App.4th at p. 234), a minor's request for a parent was an invocation of the right to counsel. The court then acknowledged that the *Fare* decision had called into question the continuing vitality of the *Burton* decision's per se rule. Therefore, the Court of Appeal rationalized the two decisions stating:

> "… We do not doubt that a juvenile's request to speak to his or her parent must be considered as an indication that the minor wishes to invoke his or her *Miranda* rights. However, *Burton* does *not* set forth a per se rule; it does not state that whenever a juvenile asks to speak to his or her parent, interrogation must cease. Instead, a juvenile's request to speak to a parent must be construed as an invocation of his or her Fifth Amendment privileges *unless* there is 'evidence demanding a contrary conclusion.' (*People v. Burton, supra,* 6 Cal.3d at pp. 383-384.) Thus, application of the

> *Burton* rule requires consideration of the circumstances surrounding the minor's request. Viewed in this way, the rules of *People v. Burton* and *Fare v. Michael C.* are not irreconcilable." (*Hector, supra,* 83 Cal.App.4th at p. 237, italics in original.)

The court found there was evidence demanding a contrary conclusion, thus warranting their affirmance that the minor had not invoked his right to counsel during his interrogation with his references to his mother. Specifically, the court pointed out that the minor's requests to speak to his mother did not indicate he was invoking either his right to silence or his right to counsel. The minor when read his rights, was 17 years of age with "substantial prior experience with police and police procedures" (*Hector, supra,* 83 Cal.App.4th at p. 237), acknowledged he had been given *Miranda* warnings on prior occasions and that he understood what those rights were. The minor requested to speak with his mother. One of the interrogating detectives attempted to contact the mother but was unable to speak with her because she was not home and left a message with the minor's stepfather. The minor was advised of this situation and did not indicate he no longer wanted to speak with the detectives about the homicide they were investigating. Later during the course of his interrogation, and ultimate confession, he indicated he wanted to speak with his mother again. The Court of Appeal construed his subsequent request as merely his desire to advise his mother of his involvement in the homicide before she learned about it from other sources. Under the totality of the circumstances, the Court of Appeal found there was evidence demanding a contrary conclusion and that the minor's requests to speak with his mother were not an invocation of his rights under *Miranda*. (*Ibid.*)

Recently, this court in *People v. Peracchi* (2001) 86 Cal.App.4th 353 acknowledged the continuing vitality of the *Burton* case in reversing the trial court's decision denying the defendant's motion to suppress his confession. In *Peracchi* the defendant, after being advised of his rights, indicated he did not want to speak. Rather than scrupulously honoring the defendant's invocation of his right to remain silent, the

officer continued questioning the defendant about why he wanted to remain silent. We found this to be impermissible, as the officer was not seeking to clarify what could be considered an ambiguous invocation of his right to silence, but was instead questioning why he would want to invoke his rights. "Officers have no legitimate need or reason to inquire into the reasons why a suspect wishes to remain silent." (*Id.* at p. 361.) In our resolution of defendant's *Miranda* claim we favorably cited the following language from the *Burton* case: "'the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely.'" (*Id.* at p. 360.)

If the minor's request for his father is construed as a request for counsel, then the subsequent readvisement and waiver obtained at the ag station is ineffective and the minor's subsequent confessions were inadmissible.

> "In *Edwards v. Arizona*, 451 U.S. 477 (1981), we established a second layer of prophylaxis for the *Miranda* right to counsel: Once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation 'until counsel has been made available to him,' 451 U.S., at 484-485–which means, we have most recently held, that counsel must be present, *Minnick v. Mississippi*, 498 U.S. 146 (1990). If the police do subsequently initiate an encounter in the absence of counsel (*assuming there has been no break in custody*), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 176-177, italics added.)

Similarly if the minor's request for his father is construed as an invocation of his right to remain silent, then any subsequent readvisement and waiver will also be ineffective, unless the minor reinitiated contact with the deputies. (See discussion, *ante*, regarding Andrew B.)

Recently the Court of Appeal for the State of Oregon considered a similar situation when it was called upon to decide whether the trial court was correct in ruling

that a minor's request to speak with his father was an invocation of his rights under *Miranda*. In *State v. Anderson* (Or.Ct.App. 2001) 28 P.3d 662, the trial court held that a 15 year old's request to call his father was a per se invocation of his rights under the Fifth Amendment. In reversing this ruling, the court reexamined its own earlier decision of *State ex rel. Juv. Dept. v. Gibson* (Or.Ct.App.1986) 718 P.2d 759, which concluded the *Burton* per se rule was no longer a viable decision in light of the *Fare's* decision requiring a totality of the circumstances approach. In the *Gibson* case the court had examined, not only the Burton decision, but also two other federal decisions, *Fare* and *United States ex rel. Riley v. Franzen* (7th Cir. 1981) 653 F.2d 1153. In *Franzen,* the Seventh Circuit Court of Appeals rejected a 17-year-old Illinois defendant's habeas petition challenging the state court rulings which found his request for his father not to be an invocation of his Fifth Amendment rights. *Franzen* concluded that the *Fare* decision was equally applicable to situations where minors request they be allowed to speak with a parent prior to or during custodial interrogations. We find the following language helpful to our resolution of the question as well:

> "At least two of the factors relied upon in *Fare* support our conclusion that Riley's request for his father was not the functional equivalent of a request for an attorney. Riley's father is not trained in the law. Consequently, he was 'not in a position to advise the accused as to his legal rights. Neither is he a trained advocate, skilled in the representation of the interests of his client before both police and courts.' [Citation.] [¶] A third factor present in *Fare* was the unprivileged nature of communications between a juvenile and his probation officer. The parties have not discussed whether Riley's communications with his parent would have been privileged under Illinois law. However, we have not found any evidence that Illinois recognizes a parent-child privilege. Consequently, we doubt whether Riley's communications with his father, had Riley been allowed to speak to him in the stationhouse, would have been privileged because such a privilege did not exist at common law and courts have been reluctant to create new privileges, preferring to leave such matters to the legislature despite any policy reasons supporting recognition of a particular privilege. [Citation.]" (*United States ex rel. Riley v. Franzen, supra,* 653 F.2d at pp. 1159-1160, fn. omitted.)

There is no evidence to show Daniel's father was trained in the law, or a "trained advocate, skilled in the representation of the interests of his client before both police and courts." (*Fare, supra,* 442 U.S. at p. 719.) Similarly, there is no communication privilege, in California, between a parent and a child. (See *Ahmad A., supra,* 215 Cal.App.3d 528.)

We agree with the courts that have concluded the Burton *per se* rule no longer survives the decision of *Fare*. Consequently, the court's decision based upon the totality of the circumstances was the appropriate test to determine whether or not Daniel's waiver of his rights and subsequent confession were voluntarily, knowingly and intelligently made. Thus with the proper test determined, we examine the court's ruling to determine if it was correct.

As found by the court Daniel did ask for his father. However, as we have concluded that is not necessarily an invocation of either his right to remain silent or his right to an attorney. Here the court also found that Daniel knew as early as 4:00 p.m. that James R. had been arrested, and that the police probably would be coming to talk with him. Daniel made no effort to contact his father between the time of 4:00 p.m. and 8:30 p.m. when the deputies eventually arrived at his home. The request, according to Sabrina T.'s testimony, was made to her and was not made specifically to the deputies. This is significant in our resolution of Daniel's contention. Had Daniel's request been directed at the deputies, it would have been some evidence in support of his contention. However, Sabrina T. testified she was still outside when the minors were advised of their rights and thus she only heard the tail end of the advisement. When she entered the trailer she observed Daniel shaking his head yes, acknowledging that he understood what had just been read to him. There was no evidence tending to show that Daniel lacked intelligence, or that he was not capable of understanding and waiving his *Miranda* rights. The court was able to observe Daniel's demeanor on the stand and assess his ability to comprehend and understand. In contrast, the court found that Matthew, Daniel's younger brother, did

not have that capability, ultimately ruling that Matthew was not capable of making a knowing, intelligent and voluntary waiver of his rights.

Viewing the evidence, in favor of the court's ruling, we conclude that the minor did not intend to invoke his Fifth Amendment rights by requesting Sabrina T. contact his father. After the minor was again advised of his rights by Deputy Alstrom, just prior to actual interrogation, Daniel knowingly, intelligently and voluntarily waived those rights. The minor's subsequent confession was therefore admissible as evidence against him.

II.

EXTRAJUDICIAL STATEMENTS OF ANDREW'S ACCOMPLICES

Andrew B. contends the court committed reversible error by considering the confessions and admissions of his nontestifying coparticipants James, Daniel and Matthew as substantive evidence of his guilt. The minor contends this violated his Sixth Amendment right to confrontation. Andrew further contends that there were no "particularized guarantees of trustworthiness" in the coparticipants confessions to overcome the presumption that the use of such confessions is unreliable.

Respondent contends the court properly admitted the coparticipants' confessions, as the procedural rules of *Aranda-Bruton*[15] are not applicable to juvenile court proceedings. Respondent further asserts that there is no indication that the juvenile court did not understand or properly follow the law. Finally, respondent contends that assuming the court did consider the confessions of the other minors in determining the truth of the allegations against Andrew B., the confessions did contain "particularized guarantees of trustworthiness" to permit the court to consider the confessions as evidence against the minor.

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15 *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

Aranda-Bruton

Aranda articulated a rule of criminal procedure prohibiting the introduction of a defendant's extrajudicial statement that directly or inferentially implicates a jointly tried codefendant, unless the statement was redacted to eliminate the direct or inferential reference to the codefendant. In *Bruton* this procedure was considered an effective means of preserving a criminal defendant's constitutional right to cross-examination. However, when such a confession or statement comes in and the declarant defendant testifies, there is no need to redact the statement as the implicated codefendant has the opportunity to test the veracity of the statement through cross-examination of the declarant. (See *People v. Fletcher* (1996) 13 Cal.4th 451, 455-456.)

However, since the adoption of Proposition 8, the truth in evidence provision of article I, section 28, subdivision (d) of the California Constitution, the criminal procedural rationale of *Aranda* is inapplicable, unless it is required to preserve a defendant's federal constitutional right to confrontation. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1045, fn. 6; *In re Lance W.* (1985) 37 Cal.3d 873, 879, 882; *People v. Boyd* (1990) 222 Cal.App.3d 541, 562-563 ["The California rule is now coextensive with the federal rule"].) Similarly, the rationale for the rule only applies to cases that are submitted to a jury, and is inapplicable in a bench trial, or as in the minor's case, a juvenile court trial. (*People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1409; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1480.)

Andrew B.'s Claim

During the course of the suppression motion, the attorneys for the minors repeatedly objected to the admissibility of the confessions of the minors on *Aranda-Bruton* grounds, the district attorney and the court acknowledged the existence of this

issue as well.[16] On March 27, 2000, during the initial stages of the actual trial, the issue of *Aranda-Bruton* came up again, specifically raised by Andrew's counsel:

> "MR. SOK: Your Honor, for the record, I'm going to object to the statement as to Andy, implicating Andy for that.
>
> "THE COURT: Aranda-Bruton issue?
>
> "MR. SOK: Yeah, Aranda-Bruton issue. That should not be considered against my client for the purpose of this statement.
>
> "THE COURT: Let me state, we've discussed this in chambers, this is a Court trial and the officer and other witnesses will be testifying to whatever statements were made by the minors, the Court will separate that which directly implicates a minor by another minor's testimony. Anything that only indirectly indicates a minor will be considered by the Court and nothing that directly implicates.
>
> "MR. RICHARDSON [Daniel W.'s counsel]: And that's for all defendants, a continuing standing objection?
>
> "THE COURT: Yes, that way you won't have to be objecting every time the issue comes up."

"Whether denial of a defendant's constitutional right of confrontation requires reversal is evaluated under the 'harmless beyond a reasonable doubt' standard of *Chapman v. California* (1967) 386 U.S. 18. [Citations.] That analysis generally depends on whether the properly admitted evidence is so overwhelming as to the guilt of the nondeclarant that a reviewing court can say the constitutional error is harmless beyond a reasonable doubt. [Citation.]" (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1390.)

Even were we to assume for the sake of argument that Andrew B. is correct that the court improperly considered the confessions of his coparticipants as evidence against him, we would not find such error to require reversal. Andrew B.'s confession was

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16 "THE COURT: "… Assuming there is a good motion -- an Aranda-Bruton motion -- you're going to win it. So we'll get to that at some point."

overwhelming evidence, standing alone, to support the court's true findings. Any error in considering the other minors' confessions was therefore harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at pp. 23-24.)

III.

SUFFICIENCY OF EVIDENCE OF GRAND THEFT

All three minors contend the evidence was insufficient to support a true finding with respect to the specific intent element of grand theft, more specifically the intent to permanently deprive the owner of possession. James R., joined by Daniel W. in his reply brief, specifically points to an apparent concession made by the prosecutor during closing arguments, which he contends is supportive of his argument.

Specifically, the prosecution stated:

> "… If the court has noted, I did not provide a CalJic for Penal Code Section 487. There's actually two reasons for that. The first one is it's not here in my pile, as I thought it was, but the second one is I wanted to come right out of the gate and tell the Court what the area, in this case, in my view, is really, the one and only area of weakness. And that area would be the intent requisite for Penal Code Section 487, as it applies to the intent to permanently deprive. [¶] As to Daniel [W.] and James [R.], I recognize that the evidence as to the intent to permanently deprive is probably weak, at best. As to Andrew, there are some different arguments, um, and so, um, and so, I would concede that point as to that charge, as to those two minors."

Respondent, ignoring this concession made by the prosecution, contends the evidence showed the minors "intended to greatly damage or destroy the tractor," and thus there was sufficient evidence to support the true findings of a violation of Penal Code section 487 as to all three minors.

We "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the

defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

All three minors were charged with the theft of the tractor under Penal Code section 487, subdivision (a). In order to prove this crime, the prosecution had to prove the elements of theft, beyond a reasonable doubt. "The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away." (*People v. Davis* (1998) 19 Cal.4th 301, 305.)

Here the evidence established that Andrew started up Mr. Couto's tractor and began driving it and the other two minors accompanied Andrew. Mr. Couto, while not the owner of the tractor, was the possessor of the tractor under his lease agreement. Mr. Couto had not given Andrew B., James R., nor Daniel W. permission to use the tractor. Thus the taking was tresspassory. The tractor was driven approximately two miles from its original location, and thus the asportation requirement of larceny was satisfied as well. The minors take issue with the element of permanent deprivation of the property.

The crime of theft, regardless of its nature, i.e., petty theft, grand theft, robbery, etc., can be committed even though the thief has no intention to convert the property to their own use. In *People v. Green* (1980) 27 Cal.3d 1 (overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3, and *People v. Martinez* (1999) 20 Cal.4th 225, 234, 235-239), the court upheld the defendant's robbery conviction. The evidence established that the defendant, prior to killing his estranged wife, made her remove her clothing which he subsequently attempted to destroy by burning. The court found the actions of the defendant in attempting to destroy the clothing was sufficient evidence to support the element of permanently depriving the owner of the property.

> "… The California statutes defining larceny and robbery (§§ 484, 211) do not require that the taking be for the purpose of gain, and we decline to read

> such a requirement into their plain terms: if the defendant intends to permanently deprive the owner of his property, the taking is larceny or robbery within the meaning of the Penal Code *even if the defendant's sole intent is to destroy the property.*" (*People v. Green, supra,* 27 Cal.3d at p. 58, italics added.)

In addition to the intent to actually destroy the property, the treatment of another's property in such a manner so as to create an unreasonable risk of permanent loss also suffices to establish the intent to permanently deprive. "Common law and California cases thus establish that an *intent to steal will be recognized when personal property is dealt with in such a way as to create an unreasonable risk of permanent loss*." (*People v. Zangari* (2001) 89 Cal.App.4th 1436, 1446, italics added.)

Andrew's intent, in this respect, can be inferred from all the surrounding circumstances, and ultimately was for the trier of fact to decide. (*People v. Morales* (1993) 19 Cal.App.4th 1383, 1393-1394 ; *People v. DeLeon* (1982) 138 Cal.App.3d 602, 606; *People v. Hall* (1967) 253 Cal.App.2d 1051, 1054.) Here the evidence established Andrew B. was the driver of the tractor, who subsequently abandoned it prior to its running into a canal. Under these circumstances it was within the province of the court, sitting as the trier of fact, to conclude that under these circumstances the property was "dealt with in such a way as to create an unreasonable risk of permanent loss." (*People v. Zangari, supra,* 89 Cal.App.4th at p. 1446.)

While it is true Daniel W. and James R. jumped off of the tractor prior to Andrew B. letting it run on and crash into the canal, their liability for the theft was vicarious. """Moreover, the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable consequences of any act that he knowingly aided or encouraged. Whether the act committed was the natural and probable consequence of the act encouraged and the extent of defendant's knowledge are questions of fact for the jury."' [Citation.]" (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, italics omitted.) We

cannot set aside the juvenile court's ruling unless the record clearly shows that under no valid hypothesis was the evidence sufficient to support its decision. (*People v. Moore* (1953) 120 Cal.App.2d 303, 306.)

"To the extent the minor contends the evidence is insufficient to prove the criminal intent requisite to accomplice liability, the juvenile court could reasonably infer from the evidence that the minor was aware of Isaac's criminal act and specifically intended to aid his criminal design. [Citations.]" (*In re George B.* (1991) 228 Cal.App.3d 1088, 1094.) The juvenile court here, could also infer from the circumstances that James R. and Daniel W. were aware of Andrew B.'s criminal act and intended to aid his criminal design. Thus the true findings as violation of Penal Code section 487, subdivision (a), as to all three minors, are supported by substantial evidence.

DISPOSITION

The findings and orders of the juvenile court as to each of the appellants are in all respects affirmed.

_____
HARRIS, J.

WE CONCUR:

_____
VARTABEDIAN, Acting P.J.

_____
WISEMAN, J.